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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DIENNA HOLLIE, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B283738 (Los Angeles County Super. Ct. No. NC060205)

APPEAL from a judgment of the Superior Court for Los Angeles County, Ross Klein, Judge. Affirmed.

Law Offices of Michele A. Dobson and Michele A. Dobson for Plaintiff and Appellant.

Office of the Long Beach City Attorney, Charles Parkin, City Attorney, Howard D. Russell, Deputy City Attorney; Alderman & Hilgers, Daniel S. Alderman and Allison R. Hilgers for Defendant and Respondent.

Plaintiff Dienna Hollie appeals from a summary judgment entered in favor of defendant City of Long Beach (City) in her lawsuit alleging a single cause of action for disparate treatment racial discrimination under the Fair Employment and Housing Act (FEHA, Gov. Code, § 12940, et seq.). She appears to contend (see section A of the Discussion, *post*) that the trial court improperly denied her request for a continuance of the motion to allow her to obtain additional information and failed to consider her evidence showing that the reason for her termination was pretext for discrimination.[1] We find no error and affirm the judgment.

BACKGROUND

A. *Background Facts*

The following facts are for the most part undisputed (to the extent Hollie raises a dispute, the dispute is not material). Hollie, an African-American woman, was employed by City as a non-career[2] parking

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[1] We note that Hollie includes a list of judgments or orders in her appellant's opening brief that (it appears) she is challenging. That list includes only two actual orders -- the order granting summary judgment and an earlier order striking her challenge to the trial judge for bias under Code of Civil Procedure section 170.1 -- and the judgment, plus some related documents. The opening brief, however, does not raise any argument regarding the challenge; it simply states that a challenge was made and the trial court ordered it to be stricken. Therefore, we conclude that Hollie has abandoned the issue and we will not address the challenge or the court's ruling with respect to it. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711.)

[2] City employed both career and non-career parking control checkers. The career parking control checker position is a full-time position that is

control checker in the Parking Control Unit from approximately 2005 until May 8, 2015. Her primary job duties were to follow an assigned street sweeper in a City-owned vehicle and issue parking citations related to street sweeping parking violations. During non-street sweeping hours, she was expected to patrol and issue parking citations for other violations (such as parking at a red curb, blocking alleys, etc.), but not for parking meter violations, which were handled by the Parking Enforcement Unit.

On February 24, 2015, Hollie filed a written complaint against City with the Department of Fair Employment and Housing (the DFEH complaint), asserting discrimination and harassment by Cheryl Black, who was the temporary Parking Control Supervisor in the street sweeping unit from October 2014 to February 2016. The DFEH complaint asserted that Black discriminated against Hollie by promoting a White male non-career co-worker to a full-time position even though he had only one year of experience while Hollie had 10 years of experience. The DFEH complaint also asserted that Black had harassed her by (1) treating her with disdain and hostility; (2) trying to intimidate her and the other non-career employees by announcing that they would be fired if they did not pass the parking control checker test with an "A"; (3) creating a hostile work environment for her and her co-workers; and (4) not treating her fairly when she sought bereavement leave after the death of her brother and when she asked to leave work

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subject to City's Civil Service rules and regulations, while the non-career position is part-time and not subject to those rules and regulations.

early the day after her home was burglarized so she could meet with the crime scene investigators.

On April 22, 2015, Hollie was on the job, driving a City-owned vehicle, when she rear-ended a stopped vehicle, causing significant damage to both vehicles and personal injuries to the driver of the vehicle that was hit. Hollie claimed that the brakes on the City vehicle did not work properly, but the brakes were inspected after the accident and were found to be operating in accordance with the manufacturer's specifications.[3] The City's five-member accident review board reviewed the documentation regarding the accident, and each member found that the accident was preventable, i.e., that Hollie was at fault. The board's findings and the supporting documentation were transmitted to Frank Ramirez, the Refuse and Street Sweeping Superintendent to make a final determination as to fault and as to what, if any, remedial or disciplinary action would be taken. Ramirez agreed with the board's findings, and ordered Hollie to undergo remedial driver training.

Two weeks after the first accident, on May 6, 2015, Hollie was involved in a second on-the-job accident. Hollie had pulled up behind a parked vehicle and issued a parking citation. When she returned to her City vehicle and tried to drive around the parked vehicle, she misjudged the distance and hit it with the City vehicle, causing damage to both vehicles. Upon review of the documentation related to the accident, the

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[3] We note that Hollie asserts that the brakes were not inspected in a timely fashion, but the evidence shows that they were inspected the day after the accident.

accident review board unanimously found that the accident was preventable. Ramirez again agreed with the findings of the board.

Hollie's employment was terminated on May 8, 2015. The reason given for her termination was that she had been involved in two accidents in City vehicles, in which it was determined she was at fault, in a two-week period.

B. *Complaint*

Hollie filed the instant lawsuit against City and Black on August 3, 2015. She voluntarily dismissed Black shortly thereafter. The operative first amended complaint, filed in November 2015, alleged a single cause of action for disparate treatment racial discrimination under FEHA, specifically Government Code section 12940, subdivision (a). Hollie alleged that her race was a substantially motivating factor in City's refusal to promote her and its decision to terminate her.

Hollie alleged the following facts to show discrimination:

- She received a performance evaluation in 2008 that reflected an excellent quality of work, yet she never was offered full time employment despite her superior qualifications and her requests for such a promotion.
- Another supervisor who is involved in legal proceedings against City, Glenn Lassiter, has stated that Black (who is Caucasian) "has a 'problem with African-American' females, and has acted in a discriminatory manner towards them at work."
- On or about February 15, 2015, Black promoted Alex Aguirre, a White man who was a non-career co-worker of Hollie's, to full time

employment, even though he had worked for City for only one year.

- After Black became temporary supervisor of Hollie's unit, she found fault with Hollie for no reason, or for reasons that had no basis in fact. Black singled Hollie out, and began a pattern of harassment and ridicule towards her; for example, Black would intentionally forget to inform Hollie about issues she had discussed with Hollie's co-workers and then admonish Hollie in front of her co-workers for not knowing what had been discussed.
- Black favored White employees she wanted to promote, including by coaching them and providing answers to questions on examinations. Black never provided such assistance to Hollie.
- On or about February 5, 2015, Black announced to non-career employees that they would be fired if they did not pass the Parking Checker test with an "A" score.
- In February 2015, Black told Hollie that her hours would be cut due to "ObamaCare."
- Black "scolded and reprimanded" Hollie because she did not give a citation to a City police vehicle that was illegally parked.
- In December 2014, Black made it difficult for Hollie to obtain bereavement time after Hollie's brother was murdered.
- Black made racist and inappropriate comments towards Hollie, "saying that she 'was one of those types,' i.e., an African-American female who is loud and stands up for her rights."

The complaint also alleged that Hollie filed a complaint against Black with the "EEOC" on February 24, 2015 (i.e., the DFEH

complaint).[4] The complaint in the present lawsuit, however, did not allege a claim for retaliation for filing the DFEH complaint.

C. *Summary Judgment*

1. *City's Motion and Evidence*

City filed a motion for summary judgment in March 2017, more than a year and a half after Hollie filed her lawsuit. City argued there was no merit to Hollie's discrimination claim because (1) her termination was motivated by a legitimate business reason (her two accidents in a two-week period) and there is no evidence of any discriminatory animus; (2) Hollie was not qualified to become a career parking control checker, and therefore her failure to promote claim necessarily fails; and (3) none of the conduct Hollie alleged is actionable because it did not constitute an adverse employment action and/or it was not discriminatory.

With regard to the failure to promote claim, City submitted admissible evidence that the only people eligible to be promoted to a career parking control checker position are people who have taken and passed the Civil Service exam. Those who pass the exam are put on lists ranked according to their scores and placed in one of three score bands (the "A" band, "B" band, or "C" band). Hollie was not in any of

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[4] We note that that "EEOC" complaint, which was attached to Hollie's separate statement in opposition to City's motion for summary judgment, does not indicate the agency with which it was filed. Hollie's responses to many of the facts in the separate statement, however, state that it was filed with the Department of Fair Employment and Housing against City.

the bands at the time Alex Aguirre (who was in the "A" band) was promoted. In fact, Hollie has never passed the Civil Service exam, and therefore has never been eligible to become a career parking control checker with City.

With regard to the termination claim, City presented the accident reports and other documentation the accident review board relied upon in making its findings with regard to Hollie's two accidents, as well as the board's findings. City also presented evidence regarding how the board operates, and Black's role in the board's review. That evidence showed that Black's role as Parking Control Supervisor was to facilitate the board by gathering the necessary documentation (traffic collision reports, photographs, witness statements, etc.), requesting the employee's two-year accident history, reserving the hearing room, setting up the computer and projector, notifying the employee and supervisor of the hearing, and taking notes during the hearing in order to prepare a brief factual summary to transmit to management with the board's findings. Black did not make any findings or recommendations.

City also submitted the declaration of Frank Ramirez, the Superintendent of the Refuse Division, who oversaw City's street sweeping operations (which included career and non-career parking control checkers). Ramirez stated that he made the decision to terminate Hollie's employment with City after her second accident because he was extremely concerned that she had been involved in two separate and preventable on-the-job accidents in a very short time frame, both of which resulted in damage to City and private property and one of which involved bodily injury. Ramirez also declared that

Black did not recommend or otherwise advocate for Hollie's termination. He stated that he was not aware of any other non-career parking control checker who had two preventable accidents within a two-week period, and that Hollie's race played no part in his decision to terminate her. He also stated that at the time of Hollie's termination, there were six non-career parking control checkers, two of whom were African-American (including Hollie), and 16 career parking control checkers, six of whom were African-American.

Finally, City submitted a declaration from Black, who discussed, among other things, the issues Hollie had raised regarding Black's treatment of her, job performance issues that had arisen with regard to Hollie, and Hollie's termination.

One of the issues Hollie had raised related to her schedule, i.e., that she no longer was assigned to a specific route every month, and that her hours had been reduced. Black explained that before she became supervisor of the unit, parking control checkers, both career and non-career, were assigned to routes on a monthly basis unless he or she chose to be a "floater," i.e., a person without an assigned route who fills in wherever necessary on a daily basis (for example, if someone is out on vacation or is sick). When she became supervisor, she made a business decision to make *all* non-career parking control checkers floaters (not just Hollie) because it would streamline and simplify the route scheduling and coverage process. Black also explained that the maximum allowable hours for *all* non-career parking control checkers (not just Hollie) had been reduced from 32 to 27 hours per week *before she became supervisor*, and it was her understanding that this was done

due to the requirements of the Affordable Care Act. She said that she never tried to prevent Hollie from working her full 27 hours per week, and, in fact, gave her opportunities to make up hours when, for example, she left work early or one of her regularly scheduled work days fell on a holiday.

With regard to Hollie's performance issues, Black stated that she did not do any formal performance evaluations of Hollie because such evaluations were not required for non-career employees, but she kept notes regarding each of the parking control checkers under her supervision, including Hollie. She submitted copies of her notes regarding Hollie, which included both positive and negative observations regarding her job performance. Several of the negative observations had to do with citations Hollie had written that had to be voided because Hollie had failed to properly document the citation by taking photographs and/or obtaining the VIN number as required, or because the car was not parked illegally. Black declared that she did not single Hollie out for criticism or disciplinary measures, and in fact had issued warnings more frequently to other parking control checkers (including non-African-American checkers) than she issued to Hollie.

With regard to Hollie's allegation regarding bereavement leave, Black stated that non-career parking control checkers were not entitled to paid time off for bereavement leave. However, she stated that all of Hollie's requests for time off in connection with her brother's death were granted on an unpaid basis. She noted that Hollie was required to provide a funeral program or similar documentation, which is required

of all employees in the department who request a day off to attend a funeral on a scheduled work day.

Finally, Black stated that she did not make the decision to terminate Hollie's employment, nor did she make any recommendation with regard to terminating her. She stated that the decision was made by people above her in the chain of command. She also declared that she does not have any animus against African-American women, and did not treat Hollie differently than any other parking control checker on the basis of race.

2. *Hollie's Opposition and Evidence*

Hollie began her opposition to the summary judgment by citing to language from *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389 for the proposition that Code of Civil Procedure 437c includes a provision that virtually mandates granting a continuance upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to the opposition. Although she identified, in general terms, a few items she asserted she had not yet received, she provided no information -- in her opposition brief or by affidavit -- regarding when and how she requested those items, and what information she expected to get from them that would be essential to her opposition.[5]

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[5] She did attach a declaration from her expert witness, who stated that she "requested" but did not receive certain specific items, but again, no information was provided about when and how those items were requested and what information the witness expected the items to provide that was essential to the opposition. In Hollie's attorney's declaration attached to the opposition, counsel stated that a motion to compel (unspecified) documents

Addressing the merits of her case, Hollie argued that her termination of employment was in retaliation for filing the DFEH complaint (despite the fact that she had not alleged a cause of action for retaliation in her complaint). She contended that no parking control checker had ever been terminated for auto accidents, that Black wrote up African-American employees for items that had never been the subject of write-ups in the past, and that Black's pattern of harassment and retaliation got worse after Hollie filed her DEFH complaint.

In support of her opposition, Hollie submitted a declaration from Anne Laguzza, a human resources management expert, and several unauthenticated documents. Laguzza declared that based upon those documents, as well as the depositions of Black, former supervisor Lassiter, and parking control checkers Erikka Bailey and Lenora Brown Hogan (the depositions were not attached to Laguzza's declaration), Laguzza opined that Hollie was terminated in retaliation for filing the DFEH complaint and that Black acted in a discriminatory manner against African-American employees during her tenure as supervisor of the parking control checkers. The documents attached to the declaration included the following:

- A September 28, 2016 letter from the United States Equal Employment Opportunity Commission (EEOC) regarding a charge of retaliation Hollie apparently filed with it. The letter states that

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sought by the expert had been filed, and a hearing on the motion was held on shortened time on May 9, 2017, the day before the opposition was filed. As City pointed out in its reply brief, the trial court denied Hollie's motion to compel by minute order issued the day of the hearing.

the EEOC determined that Hollie was discharged in retaliation for participating in a protected activity. The record on appeal does not include any other documents related to this charge (although Laguzza stated in her declaration that additional documents related to the EEOC claim were attached, they were not). Therefore, we do not know what evidence the EEOC considered in reaching its determination.

- What are purported to be Hollie's handwritten notes regarding her interactions with Black. Although the notes describe incidents that Hollie perceived of as mistreatment by Black, they do not describe any specific incident showing racial animus.
- Recommendations from the City Attorney regarding settlements with a deputy city prosecutor of a racial discrimination charge and with a car sales and service company of a claim involving damage to a rented police patrol vehicle.
- Performance evaluations for Hollie from 2006, 2007, 2008, 2009, 2011, and 2013, in which Hollie received positive ratings.
- The DFEH complaint Hollie filed in February 2015.
- City's "Vehicle Accident Reduction Policy." The policy states that any employee who violates the policy "is subject to disciplinary action up to and including termination." The policy provides, among other things, that employees "[m]ust exercise the highest degree of care when operating a City vehicle."

- Hollie's responses to discovery propounded by City.[6]
- A decision by an administrative law judge in the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board. The administrative law judge ruled that Hollie was not disqualified from receiving unemployment benefits because she was discharged due to an accident that appeared to have been the result of casual acts of negligence or carelessness rather than the result of a willful or wanton substantial breach of an important duty or obligation owed to her employer.

In addition to Laguzza's declaration and the documents attached thereto, Hollie attached to her separate statement of disputed material facts several of the same unauthenticated documents, as well as excerpts from the depositions of Lassiter, Bailey, and Black.[7] None of the excerpts include testimony to establish who the deponent is, or his or her position, experience, or qualifications to testify regarding the subject of his or her testimony. Nevertheless, it appears that Lassiter is a former supervisor in the street sweeping unit and Bailey is a parking control checker.

Lassiter testified that after Black became supervisor, black female parking checkers started complaining to him. He did not specify what those complaints were in the excerpts submitted by Hollie. He took

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[6] The trial court sustained City's objection to Hollie's discovery responses; therefore, we do not discuss them.

[7] There is no cover page for the excerpts from Black's deposition, but it is clear from the testimony that Black is the deponent.

their complaints to the bureau manager, Jim Kuhl, who concluded that no action was required because the complaints had no real merit and were frivolous. Lassiter also referred to Black's "acts of racism," but did not identify any specific acts.

Bailey testified that parking control checkers are not disciplined for auto accidents.[8] She also testified that Black was "very aggressive" when she spoke to African-Americans, saying things like, "Why do you guys always have to do that?" or just grouping people by race. She provided no other examples of Black's alleged bias.

The excerpts from Black's deposition relate to Black's decision to make all the non-career parking control checkers floaters, the decision to reduce the weekly hours of non-career parking control checkers, her inexperience in street sweeping before she became temporary supervisor, and her training regarding the prevention of discrimination or harassment in the workplace.

3. *Trial Court's Ruling*

The trial court granted City's summary judgment motion. It found there was no merit to Hollie's claim for disparate treatment racial discrimination because the undisputed evidence showed that she was terminated because she was involved in two preventable accidents within a two-week period, which is a legitimate business reason unrelated to any discriminatory animus, and she was never qualified

[8] Because the excerpts do not include Bailey's qualifications or experience, this testimony is insufficient to raise any triable issue.

for a promotion because she never passed City's Civil Service examination. The court found that Hollie did not present any evidence that the reason for terminating her employment was pretextual and that the real motivation for the termination was racial animus. As to the failure to promote claim, the court found that passing the Civil Service examination and being on the Civil Service eligibility list are absolute, impartial, and race-neutral prerequisites to becoming a career parking control checker. Therefore, Hollie failed to show that she was qualified for promotion. Finally, the court found that Hollie's "vague[] references" to additional personnel matters -- allegations that Black announced to non-career employees that they would be fired if they did not pass the parking checker test with an "A" score, and that Black found fault with Hollie for no reason and made it difficult for Hollie to obtain bereavement time -- did not amount to adverse employment actions and/or were not shown to be discriminatory toward African-Americans because the actions applied to all non-career employees.

The court entered judgment in favor of City, from which Hollie timely filed a notice of appeal.

DISCUSSION

A. *Hollie's Brief Does Not Comply With the Rules of Court*

It is difficult to decipher Hollie's arguments on appeal because the appellant's opening brief is a hodgepodge of factual statements and statements of law, with little context or analysis. Most glaringly, the brief does not comply with the Rules of Court, which require that the brief must "[s]tate each point under a separate heading or subheading

summarizing the point, and support each point by argument and, if possible, by citation of authority; and [¶] . . . [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204, subds. (a)(1)(B), (C).) Hollie's brief has *no* separate headings under her "ARGUMENT AND AUTHORITY" section, and most of her citations to the record fail to provide the specific page where the matter appears, instead providing the page range of the document in which the matter appears.

We could strike Hollie's brief or deem her points to have been forfeited for her failure to comply with these important Rules of Court. (See, e.g., *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205; *Copfer v. Golden* (1955) 135 Cal.App.2d 623, 634-635.) However, in the interest of justice, we will address the arguments to the extent we can decipher them.

The primary arguments we are able to identify are, as noted, Hollie's contentions that the trial court improperly denied her request for a continuance of the motion to allow her to obtain additional information, and failed to consider her evidence showing that the reason for her termination was pretext for discrimination. But Hollie also seems to argue in her appellant's opening brief that she established a common law claim for wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, and under Labor Code section 132a, subdivision (1), and argues in her appellant's reply brief that she also established a claim for violation of FEHA, citing Government Code section 12940, subdivision (h), based

upon retaliation for filing the DFEH complaint. We do not consider these arguments, however, because none of those claims were alleged in her first amended complaint. As explained in *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242: "The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond. [Citation.] Upon a motion for summary judgment, amendments to the pleadings are readily allowed. [Citation.] If a plaintiff wishes to expand the issues presented, it is incumbent on plaintiff to seek leave to amend the complaint either prior to the hearing on the motion for summary judgment, or at the hearing itself." (*Id.* at p. 1258.) Hollie made no such request in this case. Therefore, we will address only the two issues we identified above, i.e., the denial of Hollie's request for a continuance, and the finding that she failed to provide evidence of pretext or discrimination on her disparate treatment racial discrimination claim.

B. *Denial of Request for Continuance*

Code of Civil Procedure section 437c, subdivision (h), provides in relevant part: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." "Under this section, a continuance is mandatory *if* the conditions

recited in the section are met. [Citation.] The affidavit must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts." (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623, abrogated on other grounds in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 987-988.) "Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing . . . . [Citations.] Thus, in the absence of an affidavit that requires a continuance under [Code of Civil Procedure] section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

In the present case, the affidavits Hollie submitted failed to comply with the requirements of the statute. Neither the expert witness's nor Hollie's counsel's affidavits adequately explained what *facts* might exist that Hollie had not yet obtained, or why they were essential to justify opposition to the motion. Moreover, to the extent the affidavits referred to documents that had been requested and were the subject of a motion to compel, the trial court had denied that discovery (and Hollie did not seek review of that denial). Finally, the affidavits did not explain why she had not been able to obtain those facts sooner, given that the case had been pending for more than 20 months at the time of her opposition. "An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. . . . A good faith showing that further discovery is needed to oppose

summary judgment requires some justification for why such discovery could not have been completed sooner." (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 257.)

In light of the failure of the affidavits to adequately meet the requirements of Code of Civil Procedure section 437c, subdivision (h), the uncontested denial of Hollie's motion to compel production of the documents identified in the affidavits, and the unreasonable delay in seeking to obtain those documents, we conclude the trial court did not abuse its discretion in denying Hollie's request for a continuance.

C. *Failure to Show Pretext or Discrimination*

Hollie argues that she presented evidence sufficient to avoid summary judgment, but it appears the trial court did not consider it because that evidence is not referenced in the court's ruling. We disagree.

1. *Standard of Review on Summary Judgment*

In the trial court, a defendant moving for summary judgment must present evidence that one or more elements of the plaintiff's claim cannot be established or that there is a complete defense to the claim. If the defendant meets that burden of production, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that claim or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The plaintiff shows that a triable issue of material fact exists by pointing to evidence that would allow a reasonable trier of fact to

find that fact in favor of the plaintiff. (*Ibid.*) If plaintiff fails to do so, the defendant is entitled to judgment as a matter of law.

On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) Like the trial court, we must strictly construe the moving party's evidence and liberally construe the opposing party's evidence, and we must consider all inferences favoring the opposing party that a trier of fact could reasonably draw from the evidence. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.)

2. *Law Governing Discrimination/Retaliation Claims*

In analyzing employment discrimination claims, California courts apply the three-stage burden shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) Under that test, the plaintiff has the initial burden to establish a prima facie case of discrimination. "Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action,

. . . and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.)

If the plaintiff satisfies this initial burden, a presumption of discrimination arises and "the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[ ] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason." (*Guz*, *supra*, 24 Cal.4th at pp. 355–356.) "If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.)

"'[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.) The employee cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.'

[Citations.]" [Citations.]' [Citation.]" (*Id.* at p. 807.) The employee must do so by producing specific facts either directly evidencing the employer's discriminatory motive or showing that the employer's explanation is not credible. (*Id.* at p. 817.) The employee's "'suspicions of improper motives . . . primarily based on conjecture and speculation' are not sufficient to raise a triable issue of fact to withstand summary judgment." (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.)

3. *Application to the Present Case*

In this case, City met its burden on summary judgment by presenting evidence showing that Hollie was not promoted because she did not meet the qualifications for promotion, and that her employment was terminated for a legitimate, non-discriminatory reason, i.e., she was involved in two preventable accidents in a two-week period, each of which caused physical damage to her City vehicle and a private vehicle, and one of which caused physical injury to a private citizen. Thus, the burden shifted to Hollie to present evidence that City's stated reason was pretext for discrimination.

In asserting that she presented sufficient evidence to avoid summary judgment, Hollie relies entirely upon the declaration of her expert, Laguzza. In her declaration, Laguzza set forth her conclusions about various facts purportedly based upon her review of deposition transcripts, Hollie's responses to interrogatories, the DFEH complaint, the EEOC complaint for retaliation and City's response to that complaint, and performance reviews of Hollie. But Laguzza's conclusions are not admissible *facts* demonstrating that City's reason

for terminating Hollie's employment was pretext or that City was motivated by discriminatory animus. They are merely Laguzza's opinions, not given as an expert, regarding what the facts are.

Even if we were to consider the underlying evidence that Laguzza purportedly relied upon (to the extent it was submitted by Hollie in opposition to the summary judgment motion), we nevertheless would conclude that Hollie failed to meet her burden on summary judgment.

First, the deposition excerpts Hollie submitted in opposition to the summary judgment motion[9] do not identify any specific incidents demonstrating racial bias; instead, Lassiter referred generally to "complaints" made to him by African-American parking control checkers and Black's purported "acts of racism," and Bailey said that Black was "very aggressive" when she spoke to African-American employees. This is insufficient to raise a triable issue. (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 817 [plaintiff opposing summary judgment must provide specific facts directly evidencing employer's discriminatory motive].) The deposition excerpts also fail to show, as Laguzza concluded, that no parking control checkers were ever terminated for auto accidents; there was no testimony submitted to show that Bailey, who testified that parking

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[9] We note that Laguzza stated that she reviewed the depositions of Lassiter, Lenora Brown Hogan, Bailey, Black, and Hollie. However, there are no excerpts of the depositions of Hogan or Hollie in the record on appeal. We also note that the trial court issued an evidentiary exclusion order precluding Hollie from offering any testimony from her deposition as a discovery sanction. Hollie does not challenge that ruling on appeal.

control checkers were not disciplined for auto accidents, was qualified and had the knowledge necessary to make that statement.

Second, the trial court sustained City's objection to Hollie's use of her responses to interrogatories to raise a triable issue of fact. Hollie does not challenge that ruling on appeal. Therefore, we do not consider those responses.

Third, the DFEH complaint is not competent evidence of discrimination or bias. Not only is it an unsigned and unverified statement of *allegations*, but those allegations do not describe any instance of racial bias or discrimination on account of race. Instead, the DFEH complaint describes (1) the promotion given to a White male non-career co-worker to a position for which, the undisputed evidence shows, Hollie did not have the necessary qualification; (2) Black's alleged intimidation of, or creation of a hostile work environment for, *all* non-career employees, regardless of race; and (3) Black's alleged mistreatment of Hollie, without any allegations indicating that that mistreatment was due to Hollie's race.

Fourth, we cannot consider the EEOC complaint for retaliation and City's response to that complaint because those documents are not included in the record. But even if we consider the letter from the EEOC that Hollie submitted, which stated that the EEOC determined that Hollie was discharged in retaliation for participating in a protected activity, it would not raise a triable issue precluding summary judgment because Hollie did not allege a claim for retaliation in the first amended complaint. Thus, even assuming that City retaliated

against Hollie for filing the DFEH complaint, this fact is not evidence that Hollie was discriminated against because of her race.

Finally, there is no dispute that Hollie received positive performance reviews. But that fact does not raise an inference that City's proffered reason for her termination -- having two avoidable auto accidents in a two-week period -- was pretext. While it may support a conclusion that City's decision to terminate her employment was unwise, that alone is insufficient to survive summary judgment. (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 807.)

In short, the trial court's failure to specifically address the evidence that Hollie submitted in opposition to City's summary judgment motion does not mean it did not consider her evidence. Hollie simply failed to present any admissible evidence that City's proffered reason for terminating her employment was pretext or that City was motivated by racial animus or discrimination. Therefore, the trial court properly granted judgment as a matter of law in favor of City.

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DISPOSITION

The judgment is affirmed. City shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.